NO. 44745-2-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

MIKE KREIDLER,
INSURANCE COMMISSIONER,

Petitioner,

v.

CASCADE NATIONAL INSURANCE COMPANY,

Respondent.

BRIEF OF APPELLANTS STATEWIDE GENERAL COMPANY AND MARCEL MATAR

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A. Introduction

This matter comes before the Court of Appeals as part of a Receivership action that was filed in Thurston County Superior Court on November 30, 2004. Appellant Statewide General Insurance Company ("Statewide") formerly did business with the company in Receivership, Cascade National Insurance Co. ("Cascade"). Statewide acted as an insurance agency selling Cascade's policies and Statewide earned a commission on premiums collected for policies Statewide sold.

Statewide appeals a summary judgment order entered in favor of the Receiver regarding disputed amounts Statewide is alleged to owe Cascade/the Receivership from the collection of premium commissions. The superior court's order should be reversed and the matter remanded back to the superior court for further proceedings.

Statewide's business relationship with Cascade began in 1999. Between 1999 and 2003: Statewide sold policies; Statewide collected premiums from insureds; Statewide deposited premiums collected into a trust account controlled by Cascade; Statewide would send financial statements to Cascade outlining the amount of premiums collected; Cascade would review Statewide's financial statements to confirm the appropriate commission; and then Cascade would issue checks from the premium trust account to Statewide for Statewide's commissions.

Statewide received commission checks on a monthly basis. However, the monthly payments remitted to Statewide were preliminary estimates of commissions earned. Payments would later be balanced out because the commission calculation factored in loss ratios, which could not be determined on a monthly basis—depending on the reconciliation, future monthly payments to Statewide would be increased or reduced to balance the ledger.

Despite Cascade's control of the payments and there being virtually no discrepancies in the accounting between the amount of premiums collected versus policies written, Cascade alleged in 2003 that Statewide owed Cascade $230,000.00 in overpaid commissions. Statewide disputed that any amount was owed Cascade. However, Cascade threatened to prohibit Statewide from selling Cascade's insurance policies if Statewide did not agree to pay Cascade $230,000.00. Thus, Statewide signed a promissory note agreeing to pay Cascade $230,000.00. The payments were to be made in installments—there were actually no payments, but rather Cascade reduced the commissions each month that were otherwise due to Statewide.

After the promissory note was executed, Cascade withdrew $272,763.20 from the premium trust account. Cascade's accountant now indicates that this withdrawal in January 2004 was for Cascade's

percentage of premiums collected during the last several months of 2003. However, Cascade refused to credit the $272,763.20 against the promissory note and continued to force Statewide to pay the promissory note on an installment basis (i.e. Cascade reduced the amount of commissions Cascade paid to Statewide). Further, the $272,763.20 payment is not accounted for by Cascade in post 2003 transactions.

The parties executed a new agreement in early 2004 allowing Statewide to continue selling Cascade's insurance policies. In May 2004, Statewide and Cascade executed another new agreement regarding the companies' ongoing relationship—this time the agreement included a personal guaranty signed by Statewide's President, Marcel Matar, which purported to make Mr. Matar personally liable for any debt Statewide may have or might later incur to Cascade. The Receiver submitted no evidence to the superior court indicating there was ever a personal guaranty prior to May 2004. Further, the Receiver argues that the May 2004 Agreement changed the parties' then existing agreement to Statewide's detriment—i.e. the Receiver argues it decreased the amount of commissions Statewide was entitled to. The Receiver's argument in this regard contradicts the Receiver's argument that the personal guaranty was given in exchange for consideration.

In October 2004, Statewide and Cascade reached yet another new agreement. This agreement proposed to increase the volume/value of Cascade's insurance policies that Statewide would be authorized to sell. Unfortunately, and unbeknownst to Statewide, Cascade's principals were at that time (and apparently prior to that time) in the midst of attempting to defraud unsuspecting businesses and perpetrate federal crimes resulting in the theft of several millions of dollars. The scheme of Cascade's principals started to unravel shortly thereafter and Cascade was put into Receivership in November 2004. Statewide was not permitted to sell Cascade policies as of November 10, 2004, but Statewide did properly continue to service existing policyholders.

Cascade gave up exclusive control of premium funds in trust around the middle of 2004. In addition to the original premium trust account, which Cascade continued to retain exclusive control over, Statewide and Cascade agreed to open a second premium trust account—both Cascade and Statewide could withdraw funds from this second account. The new arrangement did not affect Statewide's practice of preparing appropriate financial statements to determine the amount of commissions due. Then, in November 2004, just before Cascade was put into Receivership, Cascade withdrew over $200,000.00 from the original premium trust account it had exclusive control over. The withdrawal

zeroed out the original premium trust account. Despite Cascade having unquestionably taken these premiums, the Receiver has refused to give Statewide credit for Cascade's receipt of those funds.

The Receiver alleges that in the Spring of 2005, shortly after it became apparent Cascade was insolvent, Statewide began to reduce the percentage of premium payments flowing from the funds in trust to Cascade. Statewide alleges the payments for the months of April 2005 – December 2005 reflected the numbers coming back into balance due to previous overpayments to Cascade (e.g. crediting the $205,893.38 payment Cascade took in November 2004 and reconciling past commissions earned by factoring in loss ratios). The Receiver has inexplicably chosen disregard payments made to Cascade in some cases (e.g. the Receiver did not give Statewide credit for the $205,893.38 payment taken by Cascade). And in other cases, the Receiver argues that Cascade should get credits that the Receiver denies Statewide (e.g. the Receiver does not credit Statewide for payments totaling $272,763.20 to Cascade in January 2004 because the Receiver says that Cascade was merely balancing the accounts, but when Statewide attempts to balance the accounts in 2005 the Receiver claims it is improper).

Additionally, the Receiver argues that the $230,000.00 promissory note should bar certain credits in favor of Statewide even though in

hindsight that agreement to pay appears to have been another example of fraud committed by Cascade's principals. And finally, with Statewide out of business due to Cascade's collapse, the Receiver argues that Marcel Matar should be personally liable based on the guaranty Mr. Matar was fraudulently induced to sign without consideration.

Statewide's position is that the Receiver should have credited Statewide for all payments received by Cascade instead of selectively ignoring certain payments. Statewide's accounting/financial expert Jennifer Sims has testified that there is virtually no discrepancy between the total value of policies written and premiums collected, which indicates that premiums were appropriately deposited to the premium trust accounts. Ms. Sims has testified that Statewide may at the most owe Cascade/the Receiver $44,580.55 and that the evidence does not support Cascade/the Receiver's claim that Statewide owes $941,878.55.

Statewide's appeal is based on the existence of material issues of fact (e.g. the Receiver's expert did not know about all of the accounts and payments Cascade made to itself and the enforceability of the personal guaranty is disputed based on probable fraud) and the superior court's misapplication of law based on perceived facts (e.g. not permitting Statewide to take offsets as specifically allowed by RCW 48.31.290).

B. Assignment of Error

Assignment of Error

The superior court erred in entering the order of March 29, 2013 granting the Receiver's motion for summary judgment, which order was based on the superior court's March 13, 2013 written opinion. Issues of fact preclude summary judgment against Statewide and Marcel Matar. Further, the Court drew improper conclusions of law based on the perceived facts.

Issues Pertaining to Assignment of Error

1. The relationship between Statewide and Cascade began in 1999. That relationship was ongoing in November 2004 when Cascade was put into Receivership. An Order to Commence Rehab Proceedings regarding the Receivership was entered in May 2005. An Order of Liquidation regarding the Receivership was entered in November 2005. The Receiver brought a summary judgment motion in September 2012 requesting payment of any balance due to Cascade from Statewide for business transactions accruing through December 2005. The Receiver calculated the amount purportedly due to Cascade from Statewide based on limited data focusing on certain months during 2005—the Receiver did not account for the full running balance dating back to the inception of the

two business' relationship. Did the Receiver's accounting improperly exclude offsets that should have been applied to Statewide's balance?

2. It is undisputed that the principals who ran Cascade, to the point where Receivership and then liquidation became necessary, are frauds. The Receiver previously argued that the contract governing the relationship between Statewide and Cascade was automatically terminated by the legal actions taken in November 2004 against Cascade. The personal guaranty signed by Marcel Matar in May 2004 was signed as a condition of that allegedly terminated relationship. The guaranty was entered with the expectation that Cascade would be an ongoing concern. But based on the actions of Cascade's principals, it appears the guaranty was fraudulently induced. Moreover, there is at least a question of fact as to whether there was valid consideration for the guaranty. Is the guaranty void or voidable?

3. The superior court entered summary judgment by choosing to rely exclusively on a spreadsheet created by the Receiver's expert, which Statewide's expert took exceptions to. For example, the Receiver's expert testified that she decided not to give Statewide a particular credit against the balance allegedly due Cascade because she did not know about all of the financial accounts that were involved with transactions between Cascade and Statewide—instead of trying to find out if the credit was

appropriate, she simply chose not to account for it without any further explanation. There is at least a question of fact as to whether the Receiver's accounting is correct and there is a question of fact as to whether the Receiver's expert had the requisite personal knowledge to provide opinion testimony. Did the Court err in granting summary judgment where issues of material fact exist in regards to the Receiver's calculations?

C. Statement of the Case

1. Beginning of Business Relationship: 1999 – 2003

Statewide and Cascade entered a "Personal Lines Managing General Agency Agreement" in 1999 with an effective date of February 1, 1999 (the "1999 Agreement"). See CP 470. The 1999 Agreement made Statewide an agent of Cascade—i.e. Statewide was authorized to "receive and accept applications for insurance, to collect and receive premiums and to bind insurance on behalf of [Cascade]." *Id.* Statewide was compensated for its services by receiving commissions on insurance written pursuant to the 1999 Agreement. See CP 472-473.

Basically, Statewide would sell Cascade insurance policies to insureds, Statewide would collect the premiums from the insureds, Statewide would deposit all premium payments into Cascade's premium trust account, Statewide would submit financial statements to Cascade,

and then Cascade would pay Statewide based on the financial statements that Statewide submitted. See CP 472-475 and CP 491-492. Monthly payments to Statewide were preliminary and would have to eventually be reconciled. See CP 467. Barbara Huang, the Receiver's proposed financial/accounting expert, who had previously been retained by Cascade during certain relevant time periods to review/reconcile/create accounting records, testified that Cascade always had someone review Statewide's monthly financial statements to verify that commission calculations were correct. See CP 657-719. Ms. Huang testified that if Cascade had any questions about Statewide's financial statements, then Cascade would contact Statewide. See CP 673.

2. Compensation Balance Dispute: 2003

At some point in 2003, Cascade apparently alleged that Statewide had received overpayments on commissions totaling $230,000.00 despite the fact that Cascade controlled the premium trust account and verified the calculations supporting commission payments that Cascade directed to be issued to Statewide. See CP 514. However, Ms. Huang testified that she had no personal knowledge of pre-2003 financial statements (CP 676-678), Cascade's President in 2003, Harold Anderson, testified that he was not involved in premium commission calculations and does not recall discussing the issue with Statewide President Marcel Matar (CP 570-572),

and Cascade's underwriting officer, John Ference, testified that he had no role from an accounting standpoint in determining the commissions that were due to Statewide (CP 603-605 and CP 612). In other words, there is no evidence in the record to support Cascade's claim that Statewide had been overpaid by $230,000.00 and Statewide's President, Mr. Matar, has testified that he was coerced to agree there had been overpayments totaling $230,000.00 under the threat of losing Cascade's business. See CP 466.

Mr. Ference, despite indicating he could not recall most of the conversations he had regarding the relationship between Cascade and Statewide, testified that he did remember Mr. Matar promising to produce evidence that Statewide had not overpaid. See CP 614. However, Mr. Matar has testified it was Cascade that promised to produce documents to support its claim an overpayment existed, but Cascade never followed through. See CP 466.

Mr. Matar did sign an agreement with an effective date of December 31, 2003 stating that Statewide would pay $230,000.00 to Cascade on an installment basis out of commissions earned. CP 514. Mr. Ference's deposition testimony confirmed Mr. Matar's statement that Statewide was given an ultimatum to either sign the December 31, 2003 Agreement or else lose Cascade's business. CP 616. The discussions

regarding this disputed issue about commission payments was brought up around the same time that Danny Pixler and Anthony Huff became involved with Cascade. See CP 774-810. A federal jury would later find Mr. Pixler and Mr. Huff liable to Cascade/the Receivership for over $19,000,000.00 for fraudulent and deceitful acts. See *Id.* and CP 813.

The December 31, 2003 Agreement also indicated that Cascade had no further financial claims regarding premium accounting between February 1, 1999 and December 31, 2003. CP 514. Nonetheless, Cascade transferred $272,763.20 from the premium trust account that Cascade controlled to Cascade's operating account in January 2004, which payment was tied to premium accounting between August 2003 and November 2003. See CP 702-703.

Cascade/the Receiver did not, in their current determination of amounts allegedly owed, give Statewide any credit for the $272,763.20 that Cascade took from the premium trust account in January 2004. See CP 726-728, CP 750-752, and CP 826-827. Nor did Cascade apply the $272,763.20 Cascade took to the $230,000.00 promissory note—Cascade continued to force Statewide to make installment payments on the note by reducing the commissions Statewide was otherwise entitled to. See *Id.* Even Ms. Huang's first instinct was to question Cascade's withdrawal of the $272,763.20. See CP 750-752.

3. New Agreements: 2004

On January 20, 2004, Mr. Matar executed a new "General Agency Agreement" (the "January 2004 Agreement") between Statewide and Cascade. See CP 516-539. Harold Anderson executed the January 2004 Agreement for Cascade on February 9, 2004. *Id.* The January 2004 Agreement did not substantially change the business relationship between Statewide and Cascade. See *Id.* and CP 470-505. For example, disbursements from the premium trust account remained under Cascade's "sole control." CP 522 (contract provision 3.2(e)). Moreover, the January 2004 Agreement explained how Cascade would pay Statewide provisional commissions based on premiums, which would later be adjusted based on factors such as loss ratios—the January 2004 Agreement acknowledged that the adjustments could result in Cascade owing more to Statewide or Cascade being owed more. CP 520-521 (contract "Article 2"). The January 2004 Agreement was only forty-one pages long according to its footer. See CP 516 and CP 541.

On February 17, 2004, Cascade sent Statewide a letter directing Statewide to substitute pages in the previously executed January 2004 Agreement. CP 541. The substitution altered Section 2.4 of the contract as follows:

> **January 2004 Agreement** – Subject to a maximum reduction of Two and One-Half Percent (2.5%), the commission payable to [Statewide] shall be reduced in Fifty One-Hundredths of One Percent (0.50%) increments for each percentage that the combined ratio of losses and allocated loss adjustment expenses incurred to combined earned premiums (exclusive of Installment and Policy Fees) exceeds **Seventy Percent (70%)**. Should the combined ratio of losses and allocated loss adjustment expenses incurred to combined earned premium (exclusive of Policy Fees) be less than Sixty-Five Percent (65%), the commission shall be increased by Fifty One-Hundredths of One Percent (0.50%) of commission for each percentage difference between **Sixty-Five (65%) percent** and the actual ratio.
>
> **Substitution** – Subject to a maximum reduction of Two and One-Half Percent (2.5%), the commission payable to [Statewide] shall be reduced in Fifty One-Hundredths of One Percent (0.50%) increments for each percentage that the combined ratio of losses and allocated loss adjustment expenses incurred to combined earned premiums (exclusive of Installment and Policy Fees) exceeds **Sixty Percent (60%)**. Should the combined ratio of losses and allocated loss adjustment expenses incurred to combined earned premium (exclusive of Policy Fees) be less than Sixty-Five Percent (65%), the commission shall be increased by Fifty One-Hundredths of One Percent (0.50%) of commission for each percentage difference between **Fifty 50%) percent** and the actual ratio.

See CP 521 and CP 543 (the **bold** font is added for ease of reference and reflects the differences/changes between the original January 2004 Agreement and the substituted language).

Mr. Matar testified that his understanding was that the substituted pages were to correct errors. See CP 467 and CP 541. Mr. Matar was

unaware that Cascade was attempting to change Statewide's loss ratio bonus and substantially alter the January 2004 Agreement. CP 467.

Cascade reformatted and supplemented the January 2004 Agreement with substitutions, signed the new document on April 28, 2004, and then forwarded the document to Mr. Matar for signature. See CP 377-421. Mr. Matar signed the document on May 2, 2004. *Id.* This new document (the "May 2004 Agreement") was forty-five pages long. *Id.* Other than formatting differences, it appears the longer May 2004 Agreement is identical to the January 2004 Agreement (plus substitutions) except that the May 2004 Agreement added a two-page personal guaranty. See CP 377-421 and CP 516-545. The Receiver acknowledges that Mr. Matar did not sign a guaranty until May 2, 2004. See CP 15. Cascade's representatives do not recall why they resent the Agreement in April/May 2004 and have not testified that the obligations between the parties changed as a result of Mr. Matar signing the May 2004 Agreement. See CP 635.

At some point in mid-2004, Statewide and Cascade agreed to open a second premium trust account in addition to the original premium trust account that Cascade had exclusive control over. CP 463-466. Cascade retained exclusive control over the original premium trust account, but not the second account. *Id.* Nevertheless, all premiums collected by

Statewide were accounted for and deposited to a trust account. *Id.* Statewide's record keeping and reporting did not change. *Id.*

In October 2004, Cascade agreed that it would expand the terms of the "January 1, 2004 general agency agreement" to include authority for Statewide to sell additional insurance policies and to increase the volume/financial limits starting in 2005. CP 260-261. But on November 10, 2004, Cascade was ordered to cease and desist activities in California, the only state were Statewide was authorized to sell Cascade's policies. See CP 310-321. Cascade quickly withdrew $205,893.38 on November 12, 2004 from the original premium trust account, which Cascade exclusively controlled. See CP 756. That withdrawal zeroed out the balance of that account. *Id.* A Receiver was appointed for Cascade on November 30, 2004. See CP 17 and CP 200-201.

4. The Receivership: 2004 – 2005

According to the Receiver, the agreement between Statewide and Cascade automatically terminated on November 10, 2004 when the California Insurance Commissioner ordered Cascade to Cease and Desist activities. CP 300-301. The Order Appointing Receiver entered in Thurston County Superior Court on November 30, 2004 prohibited agents of Cascade, such as Statewide, from interfering with the Receiver's use and control of Cascade's assets. CP 200-201. However, Statewide was

expected to and did continue to collect premiums from insureds who had existing insurance policies and deposit those premiums in the remaining premium trust account (remember, there was only one account left because Cascade liquidated the original trust account just before the Receiver was appointed). See *Id.*, CP 394, CP 468, and CP 826-827.

There is virtually no discrepancy between the amount/value of policies written and the amount/value of money deposited in the premium trust accounts. See CP 449. After the Receiver was in place, Statewide continued to carry on with its obligations (e.g. collect premiums, deposit premiums, and prepare financial statements). See CP 468 and CP 826-827. Starting with the month of April 2005, Statewide began to take more commission than it was otherwise owed for that month in an effort to balance the ledgers—this is the same process that had been followed since 1999. See *Id.*

On May 6, 2005 an Order Commencing Rehab Proceedings regarding Cascade was entered. See CP 201. On November 4, 2005, an Order of Liquidation was entered and Cascade was declared to be insolvent. See *Id.* and CP 4-9.

Statewide filed claims with the Receiver in March 2006 for lost income and reimbursement of expenses relating to Cascade's breach of the 2004 Agreement, which Statewide anticipated would be enlarged and

extended through 2005. See CP 201-203 and CP 265-275. The Receiver denied Statewide's claims and stated that one reason Statewide's claims were denied was because the amount owing was not specifically established, e.g. in a judgment or note, at the time insolvency occurred or the Receiver was appointed. See CP 206.

The Receiver thereafter filed an adversary claim against Statewide and Marcel Matar—the Receiver's claim against Statewide was filed on April 23, 2007. See CP 10-20. The Receiver filed a Motion for Summary Judgment on its adversary claim—the Motion was filed September 25, 2012. CP 324-331.

5. The Motion for Summary Judgment and Battle of Experts

The Receiver's Motion for Summary Judgment on adversary claim against Statewide cited no case law save for one case on the summary judgment proof standard. See CP 324-331. A few statutes were cited, but none were discussed. *Id.* Mainly, the Receiver pointed to an Excel spreadsheet prepared by its proposed accounting/financial expert, Ms. Huang, and argued that Ms. Huang's spreadsheet was irrefutable. See *Id.* and CP 855-867.

However, Statewide presented the testimony of its own accounting/financial expert, Jennifer Sims, who completely disagreed with Ms. Huang's conclusions. See CP 444-455 and CP 829-853. Further,

Statewide challenged the admissibility of Ms. Huang's opinions based on her admitted lack of personal knowledge. See CP 667-675 and CP 829-853. For example, Ms. Huang testified that she did not know who controlled what trust accounts at what times. See CP 667-669. When Ms. Huang was told about the original premium trust account that Cascade depleted in November 2004, Ms. Huang admitted that her spreadsheet failed to include a $205,893.38 credit in favor of Statewide reflecting that withdrawal by Cascade. CP 755-758.

Ms. Huang's conclusion that Statewide owes Cascade $941,878.54 is based on the following assumptions: Statewide owed Cascade $230,000.00 as of December 31, 2003 and the promissory note is/was enforceable; the $272,763.20 payment taken by Cascade in January 2004 should not be credited to Statewide as a payment to Cascade; the $205,893.38 payment taken by Cascade in November 2004 should not be credited to Statewide as a payment to Cascade; and Cascade was allowed to unilaterally change the commission calculation formula in May 2004 without any consideration. See CP 826-827.

Ms. Sims opined that Statewide may at the most owe Cascade/the Receiver $44,580.55. CP 444-455. Ms. Sims confirmed that Ms. Huang's spreadsheet omitted the $205,893.38 payment taken by Cascade in November 2004. CP 447. Ms. Sims confirmed that there is no evidence

supporting Cascade's allegation that Statewide owed Cascade $230,000.00 in 2003. CP 447-450. And Ms. Sims confirmed that Cascade altered the formula for calculating commissions due to Statewide, which changed the relationship between the parties to Statewide's detriment. CP 453-454.

Additionally, Ms. Sims explained how it was not possible until mid-2005 for Statewide or Cascade/the Receiver to reconcile the actual commission earned by Statewide during the calendar year 2004 versus the preliminary payments issued to Statewide based on estimates. CP 946-947. And Ms. Sims opined that Ms. Huang's conclusions were erroneous even if the focus was only on the months of April 2005 to December 2005. *Id.*

In response to Ms. Sim's points, the Receiver acknowledged the possibility of legitimate claims, but argued that to recover Statewide needs to file a new claim with the Receiver. See Verbatim Report of Proceedings (March 1, 2013 Summary Judgment Hearing) at pages 45-46. The Receiver argued that Statewide "can still file [a claim]", but would have low priority. *Id.* at page 45.

In granting the Receiver's Motion for Summary Judgment, the superior court decided that nothing which took place prior to April 2005 was material to the Receiver's adversary claim. CP 931-933. The superior court also decided that Statewide did not protest Ms. Huang's

spreadsheet soon enough and therefore Statewide should have to accept the changes Cascade made to the commission calculation formula—despite the fact that the superior court acknowledged that it was plausible Cascade deliberately altered the agreement contrary to the expectations of the parties. CP 933-935. The superior court accepted Ms. Huang's spreadsheet in its entirety and decided to enter judgment against Statewide and Mr. Matar in the amount of $941,878.55. CP 960-962.

D. Summary of Argument

The premium trust account in existence between November 30, 2004 (the date a Receiver was appointed) and December 31, 2005 (the end date included in the Receiver's adversary claim) was not an asset of Cascade. Cascade had no right to the funds in that account beyond the portion that was due Cascade—and the amount due Cascade was subject to adjustment. Cascade was paid what they were due, and, therefore, Cascade/the Receiver's claims against Statewide are invalid or at the very least grossly overstated.

Moreover, it is inappropriate to attempt to determine any amount owed by Statewide to Cascade, or visa versa, by looking at a period of only a few months in a vacuum. The premiums collected due to Cascade and the premiums collected due to Statewide can only be calculated by observing transactions over the course of several months and then

reconciling preliminary commission payments with actual premiums earned based on the appropriate formula. The Receiver's argument, which the superior court adopted, that events and transactions taking place prior to April 2005 are immaterial is a flawed argument. The entire relationship between the parties is relevant because it should be the goal of the Courts to reach a just conclusion—e.g. see that Cascade/the Receiver gets what it is owed, but no more. If the entire picture is looked at (e.g. February 1999 – December 2005), it is clear that Cascade/the Receiver's claims against Statewide are invalid or at the very least grossly overstated.

Cascade/the Receiver's claims against Statewide are also questionable when considering the likelihood that many of Cascade's claims are based on fraud. It is undisputed that individuals associated with Cascade have been found guilty of fraudulent and deceitful acts. In the case of Statewide and Mr. Matar, it appears Mr. Matar was coerced into signing a promissory note, a personal guaranty, and an altered business agreement without any consideration. It is further evident that Cascade liquidated a premium trust account by withdrawing over $200,000.00 shortly before the Receiver took control and now Cascade does not account for that money.

Some of the purported agreements Cascade/the Receiver's claims are based on are void and/or voidable. Additionally, the Receiver

previously argued that the general agency agreement between Statewide and Cascade terminated as of November 10, 2004 (the day the State of California ordered Cascade to cease and desist business activities). The Receiver cannot argue for the enforcement of provisions in the purported agreements when it is convenient for the Receiver, but then ignore the agreements when language in them does not support the Receiver's claims.

There are issues of material fact regarding what amount, if any, Statewide may owe to Cascade/the Receiver. The dispute over amounts owed is highlighted by the competing opinions of Ms. Sims (Statewide's expert) and Ms. Huang (Cascade/the Receiver's purported expert). There are also issues of material fact regarding the validity and enforcement of various agreements, including, but not limited to the personal guaranty signed by Mr. Matar.

The Court of Appeals should reverse the superior court's Summary Judgment Order and remand this matter back to the superior court for further proceedings.

E. Argument

1. Offsets are permitted by statute (RCW 48.31.290) and it is only logical they be allowed to balance credits and debts so that only the true amount owed is paid.

a. RCW 48.31.290 explicitly allows offsets

"In all cases of mutual debts or mutual credits...such credits shall be set off and the balance only shall be allowed or paid." RCW 48.31.290(1). RCW 48.31.290 expressly allows offsets in cases where an insurance company in Receivership is being liquidated. *Id.* Offsets are only prohibited in three limited circumstances, none of which apply to this case. RCW 48.31.290(2). The circumstances where offsets would not be allowed are where the offset would not be a proper claim, the payment obligation was transferred, or the payment obligation involves an assessment levied in regards to stocks. *Id.*

The first exception to the rule, where an offset is prohibited if it is not a proper claim, does not apply because even the Receiver admits that Statewide has a valid claim. See Verbatim Report of Proceedings (March 1, 2013 Summary Judgment Hearing) at pages 45-46. The second and third exceptions clearly do not apply because the offset was never transferred/purchased and does not involve levies on stocks.

Here, the evidence reflects there were mutual debts and credits between Statewide and Cascade as premiums were collected/deposited and commission payments were issued then reconciled. See CP 444-455, CP 467, CP 472-475, CP 491-492, and CP 826-827. The evidence further reflects that there is virtually no discrepancy in the amount of premiums deposited versus the policies written. See CP 444-455. Ms. Sims

calculates that if the whole picture is viewed and appropriate offsets are accounted for, Statewide may at the most owe Cascade/the Receiver $44,580.55. *Id.*

It was clearly the intent of the Legislature to allow offsets so that "the balance only shall be allowed or paid." RCW 48.31.290. The balance of the mutual debts and credits between Statewide and Cascade is no more than $44,580.55. See CP 444-455. Cascade must not be allowed to ignore offsets and receive a judgment for some trumped up figure based on an incomplete view of the accounts and improper assumptions.

b. Commonsense and fairness support allowing offsets

Cascade received approximately $900,000.00 more than it was entitled to between February 1999 and March 2005. See CP 444-455. For example, Cascade withdrew an excess of $200,000.00 in November 2004 when it liquidated the original premium trust account. See CP 756. This approximately $900,000.00 was money that Statewide earned and was entitled to. See CP 444-455 and CP 468. Beginning in April 2005, Statewide began to balance the debts and credits by taking more of the premium payments as a commission. See CP 468.

The Receiver argues that it was improper for Statewide to take offsets; although such argument contradicts the express language of RCW 48.31.290. The Receiver argues that even though Cascade had been

overpaid in the past, Statewide should have continued to pay Cascade without regard to the established procedure of reconciling past payments and taking steps to balance the ledger between the two companies. The Receiver contradictorily argues that the agreement between Statewide and Cascade was terminated in November 2004, but that Statewide should continue to honor parts of the agreement regarding premium collection. However, the Receiver ignores provisions in the agreement allowing for Statewide to take additional commissions in order to balance the ledger. The Receiver's argument is completely hypocritical and unfair.

Moreover, the Receiver's argument is based on the flawed assumption that the premium trust account was an asset of Cascade. This is not so. Cascade was only entitled to its correct portion, as determined the general agency agreement, of premiums collected.

Statewide paid Cascade its correct portion of the premiums collected. In essence, Statewide had a secured interest in the premiums collected up to the amount of the commissions Statewide was owed—Cascade was never entitled to Statewide's commissions. It would be illogical to require Statewide to pay Cascade money that Statewide earned and that was never an asset of Cascade.

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2. The [12/31/03] Promissory Note, [5/2/04] Personal Guaranty, and [5/2/04] contract changes are each void.

a. The documents lacked consideration

Statewide is out of business and thus the entire dispute between Statewide and Cascade is essentially moot except for the Receiver's argument that Mr. Matar is personally liable for the judgment. Therefore, the Appellant(s) start by focusing on the Personal Guaranty signed by Mr. Matar on May 2, 2004.

A guaranty promises a creditor that the guarantor will perform in the event of nonperformance by the debtor. *B & D Leasing Co. v. Ager,* 50 Wn.App. 299, 306, 748 P.2d 652 (1988). The rules of construction and interpretation applicable to contracts generally apply in construing a guaranty. *Bellevue Square Managers v. Granberg,* 2 Wn.App. 760, 766, 469 P.2d 969 (1970). Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties, rather than the unexpressed subjective intent of any party. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.,* 134 Wn.2d 692, 699, 952 P.2d 590 (1998); *see also Hall v. Custom Craft Fixtures,* 87 Wn.App. 1, 937 P.2d 1143 (1997) (applying objective manifestations test to asserted guaranty agreement).

As with other contracts, a contract of guaranty is not enforceable unless it is supported by consideration. *Gelco IVM Leasing Co. v. Alger,* 6 Wn.App. 519, 522, 494 P.2d 501 (1972); *King v. Riveland,* 125 Wn.2d 500, 505, 886 P.2d 160 (1994) ("Every contract must be supported by a consideration to be enforceable."). Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. *Huberdeau v. Desmarais,* 79 Wn.2d 432, 439, 486 P.2d 1074 (1971). "Before an act or promise can constitute consideration, it must be bargained for and given in exchange for the promise." *Ward v. Richards & Rossano, Inc. P.S.,* 51 Wn.App. 423, 432, 754 P.2d 120 (1988); Restatement (Second) of Contracts sec. 71(1) (1981).

Courts rarely inquire into the adequacy of consideration. But the adequacy of consideration is different from the legal sufficiency of consideration. The legal sufficiency of consideration is a question of law. *King County v. Taxpayers of King County,* 133 Wn.2d 584, 597-98, 949 P.2d 1260 (1997); *Browning v. Johnson,* 70 Wn.2d 145, 147, 422 P.2d 314 (1967).

A benefit to the principal debtor or to the guarantor on the one hand, or some detriment to the guarantee on the other, is sufficient consideration for a contract of guaranty. *Universal C.I.T. Credit Corp. v.*

De Lisle, 47 Wn.2d 318, 322, 287 P.2d 302 (1955). But a promise to carry out an already existing duty does not constitute consideration. *Northern State Constr. Co. v. Robbins,* 76 Wn.2d 357, 457 P.2d 187 (1969).

A guaranty contract made independently of the main debt requires separate and distinct consideration. *Gelco,* 6 Wn.App. at 522. For this new undertaking, a past transaction or executed consideration will not support a guaranty. *Id.* However, if a guaranty is a part of the transaction which created the principal debt, it is not necessary for the consideration to be distinct from the principal debt. *Gelco,* 6 Wn.App. at 522.

Statewide and Cascade entered the January 2004 Agreement in early 2004. See CP 516-534. Included in the terms of the January 2004 Agreement was the clause that the January 2004 Agreement could only be terminated without cause by either party giving the other one year notice. CP 529. Cascade wrote a letter to Mr. Matar dated February 17, 2004 stating that Cascade was reducing the notice period to six months. CP 541. Cascade's letter also requested that Mr. Matar substitute a page of the contract (CP 541), the text of which suggested the amount of commissions Statewide was entitled to could be reduced. See CP 453-454. Mr. Matar did not sign a personal guaranty when the January 2004 Agreement became binding. See CP 15, CP 377-421, and CP 516-545.

In late April and/or early May 2004, Cascade reformatted the January 2004 Agreement (and included the substituted provisions referenced in the February 17, 2004 letter) and sent the new document to Mr. Matar for his signature. See *Id.* The terms of May 2004 Agreement was identical to the January 2004 Agreement except for the substituted provisions, which did not benefit Statewide. *Id.* Cascade/the Receiver can present no evidence that Cascade offered any consideration to Statewide in return for signing the May 2004 Agreement. See CP 635. However, in May 2004, Mr. Matar for the first time signed a personal guaranty *Id.*

As of May 1, 2004, the day before Mr. Matar signed the personal guaranty, Statewide and Cascade had an existing and ongoing business relationship. See CP 516-545. There is no evidence that the May 2004 Agreement changed that relationship for the benefit of Statewide. See CP 377-421 and CP 516-545. And there is no evidence that Statewide and/or Mr. Matar was promised additional business or continued business in consideration of signing the May 2004 Agreement and personal guaranty. See CP 635.

Mr. Matar has testified that he resigned signature pages because Cascade represented to him that they needed the signatures for record keeping. CP 467. This is a reasonable explanation for how/why the personal guaranty was signed. There is certainly no rational basis for Mr.

Matar to have agreed to personally guarantee Statewide's obligations to Cascade where Statewide and Cascade already had on existing relationship and nothing more was added for the benefit of Statewide or Mr. Matar in consideration for the personal guaranty.

There is no evidence that the personal guaranty signed by Mr. Matar was bargained for. There is no evidence that Cascade made any return promise to Statewide or Mr. Matar in consideration of the personal guaranty. The personal guaranty signed by Mr. Matar on May 2, 2004 is void for lack of consideration.

The changes Cascade purported to make to the January 2004 Agreement are also void pursuant to contract law as discussed above. Statewide received no consideration in exchange for its alleged agreement to reduce the amount of commissions Statewide would earn or to reduce the notice period for terminating the agreement without cause.

Finally, the $230,000.00 promissory note dated December 31, 2003 is void for lack of consideration. The evidence does not support Cascade's claim that Statewide owed Cascade any money. CP 447-450. Statewide received no benefit in promising to pay Cascade $230,000.00 that Cascade could not prove that sum was rightly owed.

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b. The documents are the product of fraud

A fraudulent misrepresentation or, under the right circumstances, even a material innocent misrepresentation can render a contract voidable. *Skagit State Bank v. Rasmussen,* 109 Wn.2d 377, 384, 745 P.2d 37 (1987) (citing Restatement (Second) of Contracts § 164(1) (1981)). The Restatement (Second) of Contracts § 164(1) (1981) provides: "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."

The December 31, 2003 Promissory Note, May 2004 Agreement, and Personal Guaranty are each void for lack of consideration. Each are also voidable because Cascade induced Statewide and/or Mr. Matar's agreement by fraud. The superior court acknowledged that Statewide's arguments regarding fraud are plausible. See CP 933-935. The Receiver acknowledges that individuals involved with Cascade are criminals. CP 774-810. And Cascade's withdrawal of over $200,000.00 from the original premium trust account only a week or two before the Receiver was appointed in November 2004 smacks of scandalous activity. But when Statewide signed the aforementioned documents, Statewide had no idea Cascade's operations were being turned over to criminals.

Statewide was led to believe that Cascade was a prosperous ongoing concern. Even as late as October 2004, Cascade was representing to Statewide that Cascade had the ability to continue doing business—in fact, Cascade promised Statewide increased business. CP 260-261. Statewide would have taken control of premium trust accounts sooner and Mr. Matar would certainly never have agreed to a personal guaranty, if it was known that Cascade meant to abscond with premiums deposited and go out of business.

3. Issues of fact preclude summary judgment.

a. The summary judgment standard

When reviewing a summary judgment order, the Court of Appeals must engage in the same inquiry as the trial court, affirming summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *City of Sequim v. Malkasian,* 157 Wash.2d 251, 261, 138 P.3d 943 (2006). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400,* 172 Wash.2d 471, 484, 258 P.3d 676 (2011). It is commonly recognized that weighing evidence, balancing competing experts' credibility, and resolving conflicting issues of fact are not appropriate on

summary judgment—trial is necessary to resolve these types of issues. See *Larson v. Nelson*, 118 Wn.App. 797, 810, 77 P.3d 671 (2003).

Here, there are numerous issues of conflicting facts that preclude summary judgment. For example:

- Mr. Matar has testified that he signed documents in mid-2004 because he was told Cascade needed his signature for record keeping purposes. See CP 467. Cascade representative John Ference indicated he cannot recall why Cascade asked Mr. Matar to sign any documents in mid-2004. See CP 635. The evidence supports Statewide and Mr. Matar's theory that no consideration was given in exchange for the substitutions to the January 2004 Agreement or for the personal guaranty. There are at the very least issues of fact unless and until a representative from Cascade can come up with evidence of the consideration Cascade gave up in exchange for those documents.
- Mr. Matar and Statewide's accounting/financial expert, Ms. Sims, have testified that Statewide did not owe Cascade $230,000.00 as of December 31, 2003. See CP 447-450 and CP 466. Cascade's proposed expert, Ms. Huang, offers competing testimony, but Ms. Huang admits she cannot confirm Cascade's pre-2004 calculations. See CP 676-678. There is at the very least an issue of fact

regarding whether Statewide owed Cascade $230,000.00 as of December 31, 2003.

- Statewide has offered evidence reflecting that Cascade withdrew over $200,000.00 from the original premium trust account in November 2004 just before the Receiver was appointed. See CP 756. Cascade/the Receiver denies knowledge of the withdrawal and/or denies to credit Statewide for that withdrawal. See CP 667-669 and CP 755-758. There is at least a question of fact of whether the Receiver's calculations are overstated in light of issues concerning Cascade's questionable November 2004 withdrawal.
- Statewide's expert, Jennifer Sims, has opined that the Receiver's calculations are overstated even if the Court ignores everything before April 2005—she opines the Receiver is wrong by at least $59,330.00. See CP 946-947. Ms. Sims further opines that when the entire picture is viewed, the Receiver's calculations are overstated by approximately $900,000.00. See CP 444-455. The credibility of Ms. Sims' testimony versus the opinions offered by the Receiver's proposed expert is not an issue that is appropriate to be determined on summary judgment. Ms. Sims' testimony at least creates an issue that can only be resolved by trial.

Moreover, the testimony of Mr. Matar and Ms. Sims that premium commission payment reconciliations could only be done at certain intervals (see CP 468 and CP 947) and offsetting prior overpayments was in the normal course of business between Statewide and Cascade (see CP 468), at least creates an issue of fact as to whether time periods prior to April 2005 must be considered when calculating any amount that Statewide may owe Cascade/the Receiver. Another issue of fact, which relates to issues of fraud and consideration, is whether the commission calculations between April 2005 and December 2005 should be based on the provisions of the January 2004 Agreement or the substituted provisions in the May 2004 Agreement.

An approximately $900,000.00 difference in calculations depending on how one interprets the facts is clearly a material difference. The order granting summary judgment was inappropriate based on the summary judgment standard. That order must be reversed and this case should be remanded back to the superior court for further proceedings.

b. The Receiver's expert lacked personal knowledge and her opinions were therefore inadmissible

A witness lacks foundation if the witness has no firsthand knowledge (ER 602) or if a proposed expert witness lacks necessary qualifications (ER 702). See 5A WAPRAC § 611.5.

ER 602 states, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter...This rule is subject to the provisions of rule 703." ER 703 states, "The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing...the facts or data need not be admissible."

ERs 602 and 703 do not allow for an expert witness to give opinions regarding substantive matters that the witness has no knowledge of. ER 703 should not be confused with broadening the restrictions of ER 602 other than to allow experts to rely on appropriate data and scientific methodologies. For instance, a qualified expert may be asked to assume variables and facts in forming an opinion if there is a basis to support the assumptions. However, it would be inappropriate to ask an expert something like: "Expert X, you have not seen Document Y. But do you agree with Document Y?"

No in depth discussion should be needed regarding why an expert should not be allowed to tell a jury that he or she agrees with the conclusions of documents the expert has never reviewed. Clearly, such testimony lacks a foundational basis because in this scenario the expert lacks personal knowledge pursuant to ER 602.

The example of an expert agreeing with documents the expert has not verified seems to be far fetched. However, several of the opinions the Receiver's expert offers are based on assumptions which there is no evidentiary basis to support. The Receiver's expert testified that she has no knowledge of pre-2004 balances (see CP 676-678) and she has no knowledge regarding the control and operation of premium trust accounts (see CP 667-669). Thus, the Receiver's expert lacks foundation to opine that Statewide should not be given credit for certain payments Cascade received, including, but not necessarily limited to payments against the $230,000.00 promissory note, the $272,763.20 payment Cascade took in January 2004, and the $205,893.38 payment Cascade took in November 2004. Excluding the inadmissible opinions of the Receiver's expert reinforces the reasons to reverse the order granting summary judgment. However, there are issues of fact even when such testimony is considered.

F. Conclusion

First, Mr. Matar is not personally liable because there was no consideration given in exchange for his guaranty. Second, there are issues of fact surrounding the Receiver's calculation of amounts possibly owed by Statewide. Third, RCW 48.31.290 expressly allows offsets, which the Receiver's calculations fail to recognize. For any and all of the above grounds, the order granting summary judgment was improper.

The Court of Appeals must reverse the order granting summary judgment on the Receiver's adversary claims against Statewide and remand the matter back to the superior court for further proceedings.

DATED this 28th day of June, 2013.

Respectfully submitted,

DYNAN & ASSOCIATES

By _____
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Marcel Matar

DECLARATION OF SERVICE

On this day, the undersigned served all parties of record with a copy of the foregoing document entitled Brief of Appellants Statewide General Company and Marcel Matar as follows:

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I declare under penalty of perjury under the Laws of the State of Washington, pursuant to R.C.W. 9A.72.085, that the foregoing is true and correct.

Dated at Tacoma, Washington this 28th day of June, 2013.

By: _____
Kathy A. Bates